APPENDIX I

Penalty Policy for Violations of Certain Clean Air Act Permit Requirements for the Construction or Modification of Major Stationary Sources of Air Pollution

I. Introduction

EPA's Clean Air Act Stationary Source Civil Penalty Policy applies generally to stationary sources of air pollution which violate requirements enforceable under Section 113 of the Clean Air Act when such violations are the result of a failure to make capital expenditures and or failure to employ operation and maintenance procedures which are necessary to achieve compliance. The general policy does not, however, specifically address violations of permit requirements related to the construction or modification of major stationary sources under the prevention of significant deterioration (PSD) program and the nonaetainment area new source review program.

This document outlines a penalty policy which applies to certain permit-related violations of the Clean Air Act and provides a method of calculating a minimum settlement amount for such violations. This "Permit Penalty Policy" was originally issued in February 1981 to deal with a subject area not covered by the 1980 penalty policy. It has been revised for inclusion in the-1987 policy to reflect more realistic penalty amounts.

As illustrated by the examples, a source may have violated a new source requirement which makes it subject to this Permit Penalty Policy, and, in addition, violated a regulation subject to the general policy or another appendix. If this is the case, the Permit Penalty Policy should be used to find the minimum settlement figure for the permit violation(s) and the general policy or applicable appendix should be used to establish a penalty amount for the other violation(s). These two figures should be added together to produce an appropriate overall settlement amount. It is also important to note that the policy outlined in this document, Like the general stationary source civil penalty policy, is used to set a minimum settlement figure. Therefore, the penalty actually negotiated for can always be higher than the figure derived through use of this Permit Penalty Policy.

II. The Permit Penalty Policy

The Permit Penalty Policy covers cases involving a sources which begin construction or operation without first obtaining the required PSD or nonattainment new source permit, as well as those which construct or operate in violation of such valid permits. Construction proceeding in compliance with an invalid permit is considered to be, in the context of thin penalty policy, construction without a permit.

In these cases, when the source is operating and has enjoyed an economic benefit from noncompliance, that benefit -should be calculated as directed in the general stationary source civil penalty policy. As directed by the general policy, however, the Regional Office may decide not to calculate the economic benefit if that office decides that the economic benefit is likely to be below $5,000. The gravity component is then calculated based on the matrix contained in this permit penalty policy. Construction in the absence of a permit or in violation of a permit has been assigned a scale of dollar values on a matrix. The matrix also provides for the assessment of an additional penalty for certain specified violations of substantive permit preconditions or requirements. The appropriate dollar value for a violation is dependent on an estimate of the total cost of air pollution control at those facilities of the source for which the permit is required.1/ This value is then multiplied by the number of months of violation.2/ When there are multiple permit-related violations, a penalty figure is calculated for each violation and the individual penalty figures are added together to produce one minimum settlement figure. In those cases where a source subject to a valid permit violates only the requirements of Section 173(1) and/or Section 173(3) (requirements for construction permits in nonattainment areas), the appropriate penalty amount is determined by reference only to the matrix column(s) citing the violation(s).

The economic benefit component and the gravity component are added together to determine the preliminary deterrence amount. This initial amount should then be adjusted, using the general stationary source civil penalty policy factors which take into consideration individual equitable considerations -(Part III of the general policy.) This will yield the initial penalty figure.

The period of civil penalty liability will, of course, depend upon the nature and circumstances of the violation. For example, if a source has begun actual construction without a required permit or under an invalid permit, the penalty period

begins on the date the source began construction and continues either until the source obtains a-valid permit, notifies the State or EPA that it-has permanently ceased construction and the project has been abandoned, or the State issues a federally enforceable construction permit containing operating restrictions which keep the source below the new source review applicability threshold.3/ A temporary cessation in construction does not toll the running of the penalty period. The Agency may, however, consider mitigation of the calculated civil penalty if a source ceases construction within a reasonable time after being notified of the violation and does not resume construction until a valid permit is issued. If a source violates a permit condition, the period of penalty liability for purposes of calculating a settlement figure begins on the-first date the violation can be documented and will cease when the violation is corrected.

EPA realizes that in certain cases, it is highly unlikely that the Agency will be able to obtain the full amount of the initial penalty figure in litigation. This may be due to applicable precedent, competing public interest considerations, or the specific facts, equities, or evidentiary issues pertaining to a particular case. In such a situation it-is unrealistic to expect EPA to-obtain a penalty settlement which it could not achieve through Litigation. The litigation team must- receive the approve-L of the Associate Enforcement Counsel for Air in order to propose settling for Less than the minimum penalty amount from the matrix because of litigation practicalities.

PERMIT PENALTY POLICY MATRIX
MINIMUM SETTLEMENT FIGURES
(per month of violation)

PSD SOURCES

TOTAL COST OF AIR POLLUTION CONTROL FOR NEW OR MODIFIED SOURCE ($ THOUSANDS) CONSTRUCTION OR OPERATION WITHOUT A PERMIT OR IN VIOLATION OF A VALID PERMIT INCREMENT EXCEEDED	
less than 50	$2,000
50-150	4,000
150-500	7,000
500-1,500	11,000
1,500-5,000	16,000
5,000-15,000	22,000
15,000-50,000	29,000
over 50,000	37,000
	$7,000
	11,000
	16,000
	18,000
	2,000
	25,000
	31,000

39,000

PART D AND OFFSET INTERPRETATIVE RULING SOURCES

TOTAL COST OF AIR POLLUTION CONTROL FOR NEW OR MODIFIED SOURCE ($ THOUSANDS)	CONSTRUCTION OR OPERATION WITHOUT A PERMIT OR IN VIOLATION OF A VALID PERMIT	FAILURE TO SATISFY § 173(1) OR OBTAIN OFFSETS	VIOLATION OF SECTION 173(3) OR CONDITION 2
less than 50	$2,000	4,000	7,000
50-100			
150-500			
500-1,500			
1,500-5,000			
5,000-15,000			
15,000-50,000			
over 50,000			

11,000
16,000
22,000
29,000
37,000
$3,000
4,000
6,000
9,000
11,000
13,000
15,000
17,000
$2,000
3,000
4,000
4,000
5,000
7,000
11,000
12,000

(Add numbers when multiple categories apply)

EXAMPLE CASES

The following hypothetical cases illustrate how the matrix is used to calculate a minimum settlement figure.

PSO SOURCE

I. Facts

On July 1, 1985, an existing major source began construction of a modification to its plywood manufacturing plant. The modification will result in a significant net emission increase of particulate matter. The source had not obtained or filed for a PSD permit as of the date construction began.

On July 2, 1985, EPA investigators discovered the construction during a routine inspection of the plywood plant. The EPA Regional Office determined that the modification was subject to PSD review and issued a Notice of Violation on August 1, 1985. The NOV cited the PSD regulations and outlined possible enforcement alternatives.

The source received the NOV on August 5, 1985, and contacted the Regional Office on August 10, 1985. On August 30, 1985, the Region and the source held a conference at which the source stated that it had been aware of the need for PSD review and permitting prior to construction. The source also stated that it would file an application for a permit but that it would not cease construction during the review process.

On October 1, 1985, the source filed a PSD application. During the review process the Region discovered that the source had no plans to install pollution control devices. The Region also determined that without BACT, the modification's particulate emissions would result in an exceedance of the particulate matter increment in the source's area of impact. The source, when informed of the BACT problem, indicated it would install the necessary controls.

However, throughout the review process the source continued construction of the modification. On December 1 1985, the source began operation of the modified source without the required permit and without controls.

On January 15, 1986; the source was issued a PSD permit. On

February 28, 1986, the source ceased operation of the plywood plant to connect the pollution control equipment called for in the PSD permit. The source resumed operation on March 15, 1986 in a manner consistent with the PSD permit conditions.

II. Computation of Penalty

A. Benefit Component

The penalty calculation beg~ns with a calculation of the economic benefit of noncompliance (using the BEN model) for the period of operation without a permit (December 1, 1985 -January 15, 1986). BEN calculated a penalty of $6,400.

B. Gravity Component

This component of the penalty is calculated by initially assessing the total cost of air pollution control equipment at the modification. For purposes of this example, assume BACT costs $140.000.

Next, the PSD Matrix must be consulted and the type and number of matrix categories determined. In this example the source (1) began construction without a permit, (2) operated the plant without a PSD permit and (3) exceeded the growth increment for particulate matter. Therefore, this source is subject to both of the columns of dollar values under the heading "PSD Sources."

Once the type, number and dollar values of the penalty are determined, these figures are multiplied by the number of months in violation. The sums are then added together to 'produce the matrix penalty &mount.

In this example, the source's period of construction without a permit runs from July 1, 1985, until operations began on December 1,1985 (5 months). The period of operation without a permit runs from the time the source began operation (December 1, 1985) to the date the source received a permit (January 15, 1986) (2 months). The source also exceeded the area growth increment for particulate matter during the period of operation from December 1, 1985, to February 28, 1986 (3 months).4/

The matrix penalty figure for this source's PSD related violations, based on a $140,000 total cost of control estimate, is :

for the 5 month period of construction without a permit, 5 x $4,000 = $20,000

- for the 2 month period of operation without a permit, 2 x $4,000 = $8,000

for the 3.month period of operation during which the increment was exceeded, 3 x 11,000 = $33,000

matrix penalty figure =
$20,000 + $8,000 + $33,000 = $61,000

This is added to the economic benefit component

$ 6,400 economic benefit
61,000 gravity
$67,400 preliminary deterrence amount.

C. Adjustment Factors

1. Degree of willfulness/negligence

Because the source knew it needed a PSD permit and commenced construction without applying for a PSD permit, the gravity component is increased 10%

10% of $61,000 = $6,100

2. Degree of cooperation

No adjustment

3. History of noncompliance

No past history-of noncompliance

4. Ability to pay

No adjustment here because the source did not provide EPA with financial information indicating inability to pay.

Total Penalty

$67,400 preliminary deterrence amount
+ 6,100 adjustment
$73,500 initial minimum penalty figure

The source paid the U.S. Treasury 573,500.

Section 173 and Offset Policy Sources

I. Facts

On December 1, 1984, a plywood manufacturing company began operation of a modification at its plant which is located in a nonattainment area for particulate matter. The modification is subject to new source review permitting and, in fact, the source has obtained a valid NSR permit from the ~ State. The permit specifies 1) that the applicant has demonstrated that all other major stationary source owned or operated by the applicant in the State are in compliance with the Act, 2) what constitutes required LAER, and 3) what offsets (internal)5/.would be required to be obtained prior to start-up or commencement of operation. (These requirements are found in Section 173 of the Clean Air Act.)

In March of 1985, the Regional Office learned that the source did not install controls on a certain piece of process equipment and therefore did not have LAER as specified in the State permit. On April 1, 1985, the Region issued an NOV for failure to comply with the terms of the permit by not installing LAER prior to start-up. At an April 15, 1985, conference between EPA and the source, the source agreed to meet the terms of its permit and to demonstrate compliance. On November 15, 1985, the equipment had been installed and a performance demonstration showed that the source was in compliance-with the LAER limit specified in the permit.

II. Computation of Penalty

A. Benefit Component

The BEN model determined that the economic benefit from operating without LAER controls from December 1, 1984 until November 15, 1985 was $63,400.

B. Gravity Component

First the cost of the pollution control equipment must be determined. In this case, LAER costs $110,000. Since the plant operated from December-1, 1984 until November 15, 1985 without LAER, the period of violation is 12 months. The matrix yields a gravity component of 12 x 4,000 - $48,000. The other two categories of the NSR matrix need not be used because there were no violations in these categories.

The gravity component is-added to the economic benefit component

$63,000 economic benefit
+ 48,000 gravity
$111,400 preliminary deterrence amount

C. Adjustment factors

1. Degree of willfulness

No adjustment here. At the NOV conference, EPA learned that the company had had serious, but temporary economic reverses that prevented it fro~n installing the control equipment.

2. Degree of cooperation

No adjustments here.

3. History of compliance

No past history of noncompliance.

4. Ability to pay

No adjustment here because the company had reversed its financial losses and was currently financially healthy.

Total penalty - initial penalty target figure same as preliminary deterrence amount.

Because the State had intervened in the case and had gathered the evidence of violation, the U.S. split the penalty with the State.

The Company paid $55,700 to the U.S. treasury ant $55,700 to the State.

FOOTNOTES

1/ "Total cost of air pollution control" should include, where relevant, pollution control equipment costs, design costs, operation and maintenance costs, differential cost of complying fuel v. noncomplying fuel, and other costs pertaining to adequate control of the new source. Total cost is to be determined by examination of what would have been required as BACT (for a PSD violation) or LAER (int he case of an Offset Policy or Part D violation). When construction is done in phases, the operative amount is the total cost of air pollution controls for the entire project. If a source has installed partial control before the enforcement action commenced, that part of the cost can be subtracted from the total costs.

2. Month-by-month accrual of penalties was selected for purposes of convenience and for consistency with the general policy. Any fraction of a month is violation is counted as a full month of violation unless circumstances present a case for mitigation this rule.

3. The period of liability is not be be confused with the period of continuing violation for Section 113 notice of violation (NOV) purposes. A source which constructs without a valid permit is in continuing violation of the Clean Air Act for NOV purposes until it receives a valid permit or it dismantles the new construction.

4. It is important to note that some aspects of the matrix do not necessarily track the statutory provision regarding violations. For example, there is no Clean Air Act provision which makes increment exceedance, in an of itself, a violation by an individual source. (The SIP must protect the increment. The method used in PSD review with permit conditions such as BACT, fuel use limitations, etc.) However, as a portion of the gravity component, considering the seriousness of the violation if a source operates and thereby violates the increment due to failure to go through PSD review as required, and added penalty in appropriate.

5. In light of the Supreme Court decision in Chevron U.S.A. Inc. v. NRDC, ___ U.S. ___, 104 S. Ct. 2778 (1984), a state may choose to adopt a plant-wide definition of source in nonattainment areas. In such instances, sources obtaining internal offsets may be exempt from nonattainment new source review requirements.